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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

324 US #1

No. 870 ACM-ARS

THE ACME POULTRY CORPORATION,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

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MILTON E. SAHN,
*Counsel for Petitioner.*

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# No. 870

THE ACME POULTRY CORPORATION,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The Acme Poultry Corporation prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above-entitled case on December 21, 1944, and respectfully represents:

A

**Summary Statement**

The Acme Poultry Corporation and its President, Louis Spatz, were indicted as co-defendants on October 5, 1943,

in the United States District Court for the District of Maryland in three indictments numbered 20118, 20119 and 20120. This case concerns only one indictment; namely, No. 20119. However, for a complete understanding, it is necessary to mention briefly all three indictments.

Indictment 20119 contained fourteen counts, each count charging the Acme Poultry Corporation and Louis Spatz with making separate and distinct sales of poultry to named individuals at prices in excess of the ceiling price established by Revised Maximum Price Regulation 269 issued by the Office of Price Administration pursuant to the Emergency Price Control Act of 1942 (U. S. Code Title 50, App. sections 901 et seq.)

Indictment No. 20118 and No. 20120 were both conspiracy indictments. No. 20118 charged the Acme Poultry Corporation and its President with conspiring with certain named individuals to commit an offense against the United States of America by selling and delivering poultry at and for prices in excess of the ceiling price established by Regulation pursuant to the Emergency Price Control Act. No. 20120 alleged a similar conspiracy on the part of the Acme Poultry Corporation, Louis Spatz, Leo M. Goldschmidt, Louis Apanowitz and Leo Fleck, defendants named therein.

The defendants were arraigned on October 29, 1943, and both entered pleas of guilty to all the indictments. The Acme Poultry Corporation and Louis Spatz were represented by Thomas F. Johnson of the Maryland Bar. Milton E. Sahn, a New York Attorney appeared for the defendants, Apanowitz, and Goldschmidt in case No. 20120. Practically the entire day of October 29th was consumed by the defendants in presenting testimony in mitigation of their offenses. The case was then continued until November 8, 1943, at which time the Court heard further testimony. At the conclusion of the hearing the District Court, in the court room, in the presence of an officer of the Acme

Poultry Corporation and in the presence of the individual, imposed the following fines:

| Indictment | Defendant | Amount |
|---|---|---|
| No. 20118 | Acme Poultry Corp. | $10,000.00 |
| | Louis Spatz | 10,000.00 |
| No. 20119 | Acme Poultry Corp. | 25,000.00 |
| | Louis Spatz | 25,000.00 |
| No. 20120 | Acme Poultry Corp. | 10,000.00 |
| | Louis Spatz | 10,000.00 |

Within fifteen minutes after the fines were imposed in open court, Mr. Johnson and Mr. Sahn, approached Judge Coleman in his chambers and requested the court to reduce the fines of their clients. This the Judge refused to do. Mr. Johnson and Mr. Sahn returned to the Judge's chambers a half hour later and again sought to have the fines reduced, but without success.

An hour or two later the same day, Mr. Johnson and Mr. Kenney, the Assistant United States Attorney representing the government, conferred with Judge Coleman in his chambers. Mr. Sahn was not present at this conference. As a result of the conversation that took place, the court agreed to reduce the fines imposed on Louis Spatz to $15,000 in the aggregate and to add the amount of the reduction; namely, $30,000 to the fines imposed on the Acme Poultry Corporation. Mr. Johnson advised Mr. Kenney that he thought that the corporation would pay the fines. Without recalling and without the presence of the individual defendant and an officer of the petitioner, Acme Poultry Corporation, the District Court in chambers increased and modified the sentences as follows:

| Indictment | Defendant | Amount |
|---|---|---|
| No. 20118 | Acme Poultry Corp. | $10,000.00 |
| | Louis Spatz | 5,000.00 |
| No. 20119 | Acme Poultry Corp. | 50,000.00 |
| | Louis Spatz | 5,000.00 |
| No. 20120 | Acme Poultry Corp. | 15,000.00 |
| | Louis Spatz | 5,000.00 |

Louis Spatz paid his modified fines and was discharged.

No order was entered upon the original sentences. A final order evidencing the increased fines against the petitioner was filed the same day.

Several days later Herbert Calhoun, Vice-President and Robert Wildus, Treasurer of the Petitioner, together with Attorney Johnson and Mr. Kenney, the Assistant U. S. Attorney, attended at Judge Coleman's chambers. They were told by the District Judge that he saw no necessity for further consideration of the case.

On July 12, 1944, the Acme Poultry Corporation filed a motion in case No. 20119, praying for an order correcting the sentence imposed therein so as to conform with the original sentence of $25,000.00 imposed against said corporation in the presence of one of its duly authorized officers. It also moved to set aside the increased fine in case No. 20120 on the ground that it was in excess of the fine allowed by statute (Title 18, U. S. Code Sec. 88). At the conclusion of the hearing upon this motion, the District Court held that the increase of the fines upon the conspiracy indictment No. 20120 should be corrected since the $5,000.00 increase was without authorization and invalid and then directed, that if the fines, with the single reduction in case No. 20120, are not paid forthwith, proper proceedings should be immediately begun to enforce payment in accordance with the judgment of the Court.

On appeal to the United States Circuit Court of Appeals for the Fourth Circuit, petitioners argued the same issues that are involved in this application.

The Circuit Court of Appeals rendered and filed its decision on December 21, 1944. In affirming the order of the District Court, it held that (1) the general rule is that the trial court has power to change a sentence at any time during the term at which it is imposed, except where the

fine has been paid or the defendant has entered upon the service of a term of imprisonment (2) that there is no basis for saying that double jeopardy is involved; and (3) in effect held that the increase of the fine in the presence of the attorney for, but not in the presence of an officer of the corporation was not improper procedure.

## B

### Basis of Jurisdiction

The jurisdiction of this Court is based upon Judicial Code section 240 as amended, Title 28 United States Code, section 347 and Rule XI of the Rules of Criminal Procedure. Title 18 United States Code section 688.

## C

### Questions Presented

Whether the District Court, having imposed a valid sentence of a fine of $25,000.00 against a corporation, has the power to revise and increase the fine to $50,000.00, in chambers and not in the court room, in the absence of a responsible officer of the corporation but in the presence of and at the request of the corporation's attorney?

Whether the increase of the fine constituted double jeopardy in violation of Amendment V of the Constitution of the United States?

Whether an attorney for a Corporation has an implied power to agree to an increase of a sentence, once validly imposed, and to waive and surrender the rights of his corporate client to contest the increased sentence imposed in the absence of an officer of the corporation?

D

**Reasons for Granting the Writ**

1. The decision of the Circuit Court of Appeals is apparently in conflict with the decision of this Court in *Ex Parte Lange,* 18 Wall (U. S.) 163, 85 U. S. 163, 21 L. Ed. 872 and *United States* v. *Benz,* 282 U. S. 304, 75 L. Ed. 354, 51 S. Ct. 113 where it was held that the District Court may amend, modify or vacate its judgments, within the term of the court at which they were made, provided the punishment be not augmented.

After hearing testimony in mitigation of the offense, the District Court imposed a fine of $25,000.00 against the petitioner, in open court, in the presence of an officer of the corporation. Twice the District Court refused to reduce the fine. This original sentence was made after careful consideration of all factors. It was, accordingly, the final judgment of the Court. *Berman v. United States,* 302 U. S. 211, 213 (1937); *Hill* v. *United States,* 298 U. S. 460, 464 (1936); *Walden* v. *Hudspeth,* 115 F. (2) 558 (C. C. A. 10, 1940). No error or irregularity having been involved in the making of this sentence, the court was without power to increase it.

2. The decision of the Circuit Court of Appeals is in apparent conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Anderson, Warden* v. *Denver, et al.,* 265 F. (3) (1930) and of the Circuit Court of Appeals for the Sixth Circuit in *Wilson* v. *Bell,* 137 F. (2) 716 (1943) wherein it was held that sentence imposed in the absence of a defendant were invalid. Although these two decisions review sentences imposed upon individuals, nevertheless the principle involved should apply to corporations since "the law should have

regard to the rights of all, and to those of a corporation no less than to those of individuals * * *." *New York Central R. R.* v. *United States*, 212 U. S. 481, 495 (1909); *Kentucky Finance Corp.* v. *Paramount Auto Exch. Corp.*, 262 U. S. 544 (1923). While Federal Court precedents seem to be lacking with respect to the manner in which a corporation is present in court, the orderly process of law requires that, like an individual, a corporation must be present by one of its officers, at the time of imposition of sentence.

3. The decision of the Circuit Court of Appeals lays down a rule which is violative of the Fifth Amendment to the Constitution of the United States in that it permits the District Court, after a plea of guilty, and the imposition of a valid, determined sentence, to alter and increase its sentences, any number of times. In sustaining the order of the District Court, the Circuit Court cited its own decision in *Cisson* v. *United States*, 37 F. (2) 330, 332 wherein it pointed out that the District Court upon more mature judgment or after learning of additional facts, should not be deprived of the power to increase an inadequate sentence. In the instant case, much testimony in mitigation of the offense had been received and twice the District Court refused to reduce or alter the fine of $25,000.00. In effect the decision of the Court below permits this sentence to be twice increased. It sustains the increase to $50,000. and authorizes the addition to this sum of the excess of $5,000.00 unlawfully imposed in the conspiracy indictment No. 20120.

The question naturally arises, how many times may a District Court revise its sentence upwards? To increase it, puts a defendant to actual punishment twice for the same offense. *Ex Parte Lange*, 18 Wall (U. S.) 163, 85 U. S. 163, 21 L. Ed. 872; *Wilson* v. *Bell*, 137 F. (2) 716,

(C. C. A. 6, 1943). Upon the imposition of the original valid sentence, the petitioner became immediately liable to execution against its property, Title 18 U. S. C. Sec. 569, and in the event any of its stockholders afterwards, had received in distribution any of the corporate property, they would have been subject to a creditors suit at the instigation of the government. *Pierce* v. *United States*, 255 U. S. 398 (1921).

4. The decision of the Circuit Court of Appeals is not in harmony with the decision of this court in *Roberts* v. *United States*, October Term, 1943, 88 L. Ed. Advance Opinions 68, wherein it was held that the power of the court to increase a sentence must be found in a legislative grant of such authority.

5. The decision of the Court below with respect to the authority of an attorney to appear and plead and manage a criminal cause for a corporate defendant improperly extends the powers of an attorney and erroneously cloaks him with all the powers of an officer of the corporation for the purpose of the imposition of a sentence thus permitting him to waive and surrender the rights of his client in the absence of an officer of the corporation and without any specific authorization. There is a distinction between the presence of a corporation before the Court and the manner in which it may appear in a criminal or civil proceeding. The right to assistance of counsel does not convert the attorney into an agent or officer of the corporation.

6. The proper decision of this case is a matter of wide importance in the administration of justice. It will set at rest much doubt as to the power of the District Court to increase a valid sentence and will determine (1) the manner in which a corporation must be present in the Criminal Term of the District Courts and (2) the extent of the

implied authority of the attorney to represent and bind the corporate defendant.

Inasmuch as a supporting brief would duplicate the summary statement and the foregoing reasons, none will be filed.

WHEREFORE, your petitioner prays that a Writ of Certiorari may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the said United States Circuit Court of Appeals affirming the judgment in this case may be reversed, and that the petitioner may have such other relief as this Court may deem appropriate.

Dated: New York, N. Y., January 12, 1945.

ACME POULTRY CORPORATION,
*Petitioner,*
By MILTON E. SAHN,
*Counsel for Petitioner.*

STATE OF NEW YORK,
County of New York,
City of New York, ss:

Milton E. Sahn, being duly sworn, deposes and says that he is the attorney for the petitioner in the foregoing petition; that he has read the said petition and has personal knowledge of the matters and things therein set forth and believe the same to be true.

Deponent further states that the said petition for a Writ of Certiorari is prepared and filed in the utmost good faith, believing that the same is meritorious, and that said petition

is not prepared and presented in order to be vexatious or to delay the final judgment in the case.

MILTON E. SAHN.

Sworn to before me this 12th day of January, 1945.

EDNA M. TRNKA,
*Notary Public*, Bronx Co.

Bronx Co. Clk's No. 63, Reg. No. 73-T-6.
N. Y. Co. Clk's No. 336, Reg. No. 193-T-6.
Commission Expires March 30, 1946.

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